Supreme Court, U.S.
FILED
JAN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals For the Eighth Circuit

BRIEF OF RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY IN OPPOSITION TO THE PETITION

CHARLES ALAN SEIGEL
H. KENT MUNSON
Counsel of Record
THE STOLAR PARTNERSHIP
515 Olive Street, 17th Floor
St. Louis, Missouri 63101
(314) 231-2800

Attorneys for Respondent
Missouri-Kansas-Texas Railroad

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Table of Authorities	i
Parties To The Proceedings	iii
Rule 28 Compliance	iii
Statement Of The Case	1
Summary Of Arguments	4
Argument	5
I. 49 U.S.C. §11341(a) Exempts The ICC Merger Order Herein From The Requirements Of The Railway Labor Act And From The Anti-Injunction Provisions Of The Norris-LaGuardia Act, 29 U.S.C. §101, *et seq.*	5
II. The Injunction Issued By The District Court Does Not Violate The Thirteenth Amendment To The Constitution Of The United States Nor Any Other Federal Law	10
Conclusion	11

TABLE OF AUTHORITIES

Cases:

BLE v. Chicago & Northwestern Railway Co., 314 F.2d at 424 (8th Cir. 1963) *cert. denied,* 375 U.S. 819 (1963)	5,7
Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 104 S.Ct. 2778 (1984)	10

Ex Parte No. 260, Revised Regulations Governing Officers, 366 ICC 679 at 682 (1970) 10

Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc., 311 U.S. 91 (1940) 7

Norfolk & Western Railway Company v. Richard Nemitz, 404 U.S. 37 (1971), *reh'g. denied,* 404 U.S. 1026 (1972) 5,6

Order of Railroad Telegraphers v. Chicago & North Western R.R., 362 U.S. 330 (1960) 7

Railway Express Agency, Inc., 348 ICC 157 at 215 (1975) 10

Schwabacher v. United States, 344 U.S. 182 (1952) 8

Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, 307 F.2d 151 (5th Cir. 1972), *cert. denied,* 371 U.S. 952 (1963) 9

Texas Turnpike Authority Abandonment - St.L. S. W. Ry. Co. of Texas, 328 ICC 42 at 46 (1965) 9

Union Pacific Railroad Company—Control—Missouri Pacific Railroad Company, 366 ICC 462 (1982), *aff'd* in relevant part, Southern Pacific Transportation Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied,* 105 S.Ct. 1173 (1984) 1

Statutes:

49 U.S.C. §11341 5,7,8,9

PARTIES TO THE PROCEEDINGS

The Petitioners herein, the United Transportation Union and Messrs. I. Newcomb, R. D. Hogan, K. R. Guethle, W. J. Shelton, R. L. Helms, T. K. Arthur, R. W. Bretch, R. P. Shocklee, B. J. Bennett, J. E. Queathem and K. M. Danneman, were all Defendants in the original suit filed by the Missouri Pacific Railroad Company in the District Court below.

Respondent Missouri Pacific Railroad Company was the original Plaintiff in the action filed in the District Court below.

The Missouri-Kansas-Texas Railroad Company intervened as a party Plaintiff in the original action filed in the District Court below.

The Interstate Commerce Commission intervened in the United States Court of Appeals for the Eighth Circuit proceeding.

Rule 28 - Subsidiaries Parents And Affiliates of Respondent

Katy Industries, Inc.

Sterling - Salem Corporation

Diamond Stylus Company, Ltd.

G.E.G.F. (USA), Inc.

Galveston, Houston & Henderson Railroad Company

Terminal Railroad Association of St. Louis

No. 85-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals For the Eighth Circuit

BRIEF OF RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY IN OPPOSITION TO THE PETITION

STATEMENT OF THE CASE

In October, 1982, the Interstate Commerce Commission ("ICC"), approved the consolidation of the Missouri Pacific Railroad ("MoPac"), with the Union Pacific Railroad Company. See *Union Pacific Railroad Company—Control—Missouri Pacific Railroad Company,* 366 ICC 462 (1982), *aff'd* in relevant part, *Southern Pacific Transportation Co. v. ICC,* 736 F.2d 708 (D.C. Cir. 1984) *cert. denied,* 105 S.Ct. 1173 (1984). To minimize the impact of said consolidation on com-

petition, Respondent Missouri-Kansas-Texas Railroad Company ("MKT"), in said proceedings before the ICC, sought and obtained the right to operate its trains over MoPac's rail lines between Omaha, Nebraska, and Kansas City, Missouri (the trackage rights). (See 366 ICC at 567, *et seq.*) These trackage rights sought and obtained by MKT would allow MKT to operate its own trains, using its own employees and equipment over MoPac tracks, giving MKT direct access to the grain markets in the Omaha, Nebraska area. (*Id.*) Although Petitioner United Transportation Union ("UTU"), actively participated in the ICC proceedings, never once did the UTU object to MKT's proposed operating plans, including the use of MKT employees to operate MKT equipment pursuant to the trackage rights.

Subsequent to the ICC order approving the consolidation, Petitioner UTU and MKT entered into a collective bargaining agreement which established the terms and conditions of employment pursuant to which MKT employees would operate MKT equipment over such tracks (App. 5c).[1] At no time did the UTU suggest to MKT that MKT did not have the right to use its own employees on such trains. The formal trackage rights agreement between MKT and MoPac recognized that MKT should, with its own employees, at its own cost and expense, operate its own trains and equipment over the tracks in question (App. 6c).

Despite the fact that the UTU had previously entered into an agreement with MKT approving MKT's use of its own employees to operate its own equipment over said tracks, several days before the operations were to begin, UTU demanded of MoPac that MKT use MoPac crews to conduct the trackage rights operations (App. 6c, 7c). MoPac was, in essence, placed in the middle of a controversy between two factions of the UTU—i.e., the local representing MoPac

---

[1] All references to the record are made herein by citing the Appendix to Petitioners' Petition herein (App.).

employees and the local representing MKT employees. Nevertheless, MKT began its trackage rights operations and continues the same to date (App. 6c). Shortly thereafter, UTU threatened to strike the MoPac operation if MoPac did not arrange "to halt this trespass on our collectively bargained agreements and our seniority period" (App. 6c, 7c).

On March 30, 1983, MoPac filed its Complaint in the United States District Court for the Eastern District of Missouri seeking declaratory and injunctive relief against the threatened strike (App. 7c). On that date, the District Court entered a temporary restraining order enjoining a UTU strike against MoPac. (*Id.*) Thereafter, MKT intervened in the District Court action as a party Plaintiff (App. 3c). Subsequently, Cross-Motions for Summary Judgment were filed by the parties in the District Court (App. 2c). On February 7, 1984, the District Court entered a preliminary injunction, thereby granting, in part, MKT and MoPac's Motions for Summary Judgment (App. C Fn 1). Thereafter, on March 16, 1984, a trial on the merits was held based on a stipulated record. The Court thereafter entered a permanent injunction (App. C and D). The District Court held that (a) UTU's threatened strike would violate the Railway Labor Act, (b) that neither MoPac nor MKT had violated the Railway Labor Act or the Norris-LaGuardia Act, (c) that the issue involved here was a minor dispute (i.e., a dispute over the meaning of a collective bargaining agreement as to which the Railway Labor Act describes compulsory arbitration as exclusive remedy and, therefore, the Norris-LaGuardia Act did not bar an injunction in the case), and finally, (d) that even if the case involved an issue that was not a minor dispute, 49 U.S.C. §11341(a), affording an exemption from all federal and state laws affecting a merger of railroads, as was involved herein, would override the Norris-LaGuardia Act and allow the Court to enjoin this threatened strike so as to allow the railroads to carry out the ICC-approved consolidation found to be in the public interest. (*Id.*)

The UTU then appealed the Court's permanent injunction order to the United States Court of Appeals for the Eighth Circuit. On January 15, 1986, the Eighth Circuit rendered its *per curiam* decision affirming the District Court's judgment. A copy of the Eighth Circuit's opinion is attached hereto as Appendix A.

SUMMARY OF ARGUMENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

The Order Of The ICC Granting MKT Trackage Rights Is Plenary And The Norris LaGuardia Act Anti-Injunction Provisions Must Yield For The Reason That 49 U.S.C. §11431(a) Exempts The ICC Merger Plan From The Effect Of All State And Federal Law Which Would Conflict With The Plan.

II

The District Court's Injunction Does Not Violate The Thirteenth Amendment To The Constitution Of The United States; Section 2, Tenth Of The Railway Labor Act, 45 U.S.C. §152, Tenth; Nor 29 U.S.C. §52 For The Reason That Said Injunction Does Not Require Employees To Work, Rather Prohibits Illegal Work Stoppages. The Employee Always Retains The Right To Elect To Terminate His Employment Relationship With MoPac.

ARGUMENT

I

Petitioners argue that the District Court (and now the Eighth Circuit)[2] erred when it held that Petitioner UTU was precluded from striking MoPac to frustrate the implementation by MKT of the trackage rights as granted by the ICC. Petitioners paint for the Court a picture of momentous error on the part of the courts below when it enjoined Petitioners' strike against MoPac. Nothing could be further from the true picture.

Assuming that the controversy did not involve a "minor dispute", the courts below held that MoPac is exempted under 49 U.S.C. §11341(a) from the requirements of the RLA to negotiate with respect to "major disputes" (App. 22c). The courts below held that the ICC authority in merger and trackage rights proceedings is plenary and exclusive (App. 23c). Consequently, the anti-injunction provisions of the Norris-LaGuardia Act must yield so as not to frustrate the public interest findings and orders of the ICC (App. 23c).

Petitioner herein, however, claims that such holding of the courts below conflict with the case law of this Court and of other Circuit Courts. This Court, on the contrary, has been abundantly clear that no labor union nor management activity may frustrate the public interest orders of the ICC. *Norfolk & Western Railway Company v. Richard Nemitz,* 404 U.S. 37 (1971), *reh'g. denied,* 404 U.S. 1026 (1972). See also *BLE v. Chicago & Northwestern Railway Co.,* 314 F.2d at 424 (8th Cir. 1963) *cert. denied,* 375 U.S. 819 (1963).

In *Nemitz,* Norfolk & Western, prior to acquiring other railroad lines *through merger,* had an agreement with several

---

[2] Inasmuch as the Eighth Circuit affirmed the District Court the conclusions of the Eighth Circuit and of the District Court's are referred to as "the courts below".

labor unions for the protection of the employees on the railroad lines which were to be acquired. The agreement provided that employees of the acquired lines would not be adversely affected in their employment as a result of the merger. The agreement specifically provided that the post-merger earnings would not be lower than the pre-merger earnings. The Interstate Commerce Commission, in approving the merger, specifically approved the agreement between Norfolk & Western and the labor unions as a condition to the Commission's approval of the merger. After the merger went into effect, certain employees were not paid the compensation promised. At the time when they were about to arbitrate their grievance, the union and Norfolk & Western entered into a new agreement which substantially reduced the compensation payable to such employees. The employees' union then refused to arbitrate their claim, and the employees then sued for damages in the federal courts in that case. The employees argued that their union and Norfolk & Western could not, after the merger, enter into any agreement which would eliminate any of the protections granted to them by the pre-merger agreement, which was a condition of the ICC's approval of the merger.

This Court, in *Nemitz, supra,* at 44, held that the post-merger agreement, which abrogated the pre-merger protective conditions approved by the ICC, must be held to be null and void. In other words, the parties could not negotiate new conditions which were contrary to the express conditions upon which the merger was approved by the ICC.

In the case at bar, the ICC has made it abundantly clear that its grant of trackage rights to MKT, together with the right of MKT to use its own crews to operate such trains, were conditions upon which the ICC approved the Union Pacific-Missouri Pacific merger. The UTU herein, like the Norfolk & Western in the *Nemitz* case, is attempting to change one of the foundation conditions of the ICC approval of the merger. In this case, as in the *Nemitz* case, the ICC conditions must remain intact.

Petitioners claim herein that even if the union's conduct was rendered unlawful by the ICc's order granting trackage rights (which illegality is clear from reading *Nemitz, supra*), the courts below erred in holding that it had jurisdiction to enjoin such unlawful conduct (Petition, p. 20). Petitioners claim that this Court's previous opinions and the opinions of the circuit courts hold that a union may strike with impunity in order to frustrate a merger plan mandated by the ICC (Petition, p. 20). However, no such precedent exists.

The Petition refers to the cases of *Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940); *Order of Railroad Telegraphers v. Chicago & North Western R.R.*, 362 U.S. 330 (1960) as precedents for its proposition that despite the illegality of the union's acts, the Norris-LaGuardia Act withdraws jurisdiction from the Federal Courts to issue injunctive relief.

The *Milk Wagon Drivers* case, *supra,* is very different from the case at bar. In that case, the policies of the Sherman Anti-Trust Act, 15 U.S.C. §1 *et seq.*, conflicted with the labor policies of the Norris-LaGuardia Act. This Court found specifically that the Congress enacted the Norris-LaGuardia Act to prohibit injunctions for violations of anti-trust laws. 311 U.S. at 101. In the case at bar, the opposite is true. The clear Congressional mandate contained in the language of 49 U.S.C. §11341(a) is that — "A carrier, corporation, or person participating in [an] approved or exempted transaction is *exempt* from anti-trust law and *from all other law,* including State and municipal law, *as necessary to let that person carry out the transaction,* hold, maintain, and operate property, and exercise control or franchises acquired through the transaction." (49 U.S.C. §11341(a) (emphasis added). The merger transaction is exempted by virtue of §11341(a) from restraints of the Norris-LaGuardia Act.

Likewise, the *Chicago & North Western R.R.* case is much different from the case at bar. Therein, the Court was faced

with a confrontation between a union which desired to preserve jobs and a railroad that desired to abandon non-essential intrastate stations. The local state public service Commission had approved the railroad proposal to abandon non-essential stations. The local state public service Commission had approved the railroad proposal to abandon non-essential stations. The Court, in holding that the Norris-LaGuardia Act withdrew jurisdiction to issue an injunction in that case, found that there was no specific legal command that the union was violating therein. That case, unlike the case at bar, did not involve an order of the ICC with its plenary power over merger transactions. That case, unlike the case at bar, did not involve §11341(a) which specifically exempts a merger transaction from the restraints of *other* laws.

The Court in *Schwabacher v. United States,* 344 U.S. 182 (1952) addressed the exemption provision of the Interstate Commerce Act and its importance in a railroad merger transaction. The exemption provision was then Section 5(11)—now 49 U.S.C. §11341(a). In that case the Court held:

> Approval of a voluntary railroad merger is dependent upon three, and upon only three, considerations: First, a finding that "it will be consistent with the public interest" (§5(2)(b)). Second, a finding that, subject to any modification made by the Commission, it is "just and reasonable" (§5(2)(b)). Third, assent of a "majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote" (§5(11)). (Emphasis added.)

(*Id.*at 194).

The Court then stated that,

> When these conditions have been complied with, the Commission-approved transaction goes into effect without

> need for invoking any approval under state authority, and the parties are relieved of restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transactions.

(*Id.*)

The Norris-LaGuardia Act certainly is a "Federal" law. Therefore, it too must yield if it is necessary to enable the merger approved by the ICC to be consummated.

Moreover, Petitioners err when they rely on the Fifth Circuit case of *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen,* 307 F.2d 151 (5th Cir. 1972), *cert. denied,* 371 U.S. 952 (1963) in support of their proposition that the Norris-LaGuardia Act must prevail when there is a conflict between that Act and the Interstate Commerce Act, 49 U.S.C. §11341 *et seq.* While the *Texas & New Orleans* case was resolved favorably to the union therein, the case did not involve a conflict between the Norris-LaGuardia Act and the Interstate Commerce Act. The Fifth Circuit emphatically held that *if* there was a clash between the two Acts, the Interstate Commerce Act would prevail.

> If it should be determined that the Commission's authority under section 5 is being frustrated by application of Norris-LaGuardia to the present suit, *we would have to conclude that Norris-LaGuardia was preempted by section 5(1)),* [the predecessor of §11431(a)], *even though section 5 is not labor legislation.* (Emphasis added.)

307 F.2d at 158.

Not only has the case law held that the ICC power is plenary in merger transactions, the long-held interpretation of the Interstate Commerce Act by the ICC is that the merger orders, such as are involved herein, are self-executing and plenary. (See e.g. *Texas Turnpike Authority Abandonment-St.L. S.W. Ry.*

Co. of Texas, 328 ICC 42 at 46 (1965); *Ex Parte No. 260, Revised Regulations Governing Officers,* 336 ICC 679 at 682 (1970); *Railway Express Agency, Inc.,* 348 ICC 157 at 215 (1975). The Court in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.,* 104 S.Ct. 2778 (1984) held at 2782 that in construing a statute, considerable weight must be given to the construction of that statute given by the agency charged with the administration thereof.

This Court's opinions, the opinions of the Court of Appeals and the long-held interpretation of the Interstate Commerce Act have all made it clear that the merger transaction ordered by the ICC cannot be frustrated by a conflicting Norris-LaGuardia Act.

II

Finally, the District Court's injunction is not violative of the Thirteenth Amendment to the Constitution of the United States nor any other law.

Petitioners, tongue-in-cheek, present the question of whether the District Court's injunction is an order of involuntary servitude in violation of the Thirteenth Amendment, the Railway Labor Act and 29 U.S.C. §52. Other than to raise the question, the Petition herein does not address the merits of the issue. However, the District Court properly analyzed the issue when raised below.

> Defendant's thirteenth amendment argument must also be rejected. The thirteenth amendment prohibits involuntary servitude. The injunction herein does not compel any employee to work against his will, nor does it prohibit any employee from voluntarily quitting. The injunction only prohibits work stoppages arising out of the matters in dispute in this litigation. Therefore, the injunction does not violate the thirteenth amendment. *See United States v. Martinez,* 686 F.2d 334, 345-46 (5th Cir. 1982); *New*

Orleans Steamship Assn. v. General Longshore Workers, 626 F.2d 455, 463 (5th Cir. 1980), *aff'd sub. nom., Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assn.,* ____ U.S. ____, 102 S.Ct. 2673 (1982).

Inasmuch as the employees of MoPac have their choice to be employed by MoPac, there is no involuntary servitude involved. They are only enjoined from striking to frustrate the ICC merger order. Again, strikes by the UTU against MoPac would frustrate the comprehensive merger plan ordered by the ICC.

CONCLUSION

For the reasons set forth above, Respondent Missouri-Kansas-Texas Railroad Company respectfully requests that the herein Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals be denied.

Respectfully submitted,

Charles Alan Seigel
H. Kent Munson
(Counsel of Record)

THE STOLAR PARTNERSHIP
515 Olive Street, 17th Floor
St. Louis, Missouri 63101
314-231-2800

Attorneys for Respondent
Missouri-Kansas-Texas
Railroad Company

Date: January 23, 1986

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1465

Missouri Pacific Railroad Company and
Missouri-Kansas-Texas Railroad Co.,
Appellees,

vs.

United Transportation Union; General Committee of Adjustment; I. Newcomb; K.R. Guethle; R.D. Hogan; W.J. Shelton; Richard L. Helms; T.K. Arthur, R.W. Bretch; R.P. Shocklee; B.J. Bennett; K.R. Menges; J.E. Queathem and K.M. Danneman,
Appellants.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: January 14, 1985

Filed: January 15, 1986

Before BRIGHT, Senior Circuit Judge, ARNOLD and BOWMAN, Circuit Judges.

PER CURIAM.

Appellants (United Transportation Union (UTU), its General Committee of Adjustment, and certain of its agents and officers) ask us to vacate the permanent injunction entered by the

District Court[1] barring them and those in active concert or participation with them from striking, picketing, and other specified actions. The injunction is limited to actions against Missouri Pacific Railroad Company (MOPAC) as a result of the operation of Missouri-Kansas-Texas Railroad Company (KATY) trains over MOPAC tracks under trackage rights granted to KATY by the Interstate Commerce Commission (ICC). We affirm.

The ICC granted KATY the trackage rights in question, over MOPAC's opposition, as a condition of the ICC's approval of the consolidation of MOPAC with Union Pacific Railroad Company. *See Union Pacific Corp.*, 366 I.C.C. 459 (1982), *aff'd sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985). This consolidation was effected in December 1982. Early in January 1983 KATY, using its own employees, began operations over MOPAC tracks in accordance with the ICC's decision.

UTU sought to have MOPAC require KATY to use MOPAC crews in conducting its trackage rights operations. MOPAC took the position that the ICC had given KATY the right to use its own crews in those operations, and therefore that the matter was out of MOPAC's hands. KATY, for its part, entered into agreements with its own UTU employees to operate its trains in the implementation of its trackage rights over MOPAC tracks as authorized by the ICC. By Mailgram dated March 28, 1983, UTU threatened to strike MOPAC beginning April 4, 1983 if arrangements were not made "to halt this trespass on our collectively bargained agreements and our seniority by non-Missouri Pacific employees. . . ." Stipulations, Appendix I.

---

[1] The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri.

On March 30, 1983, MOPAC initiated the present litigation by filing its complaint under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 11341 *et seq.*, seeking declaratory and injunctive relief against the threatened strike. On the same date, the District Court entered a temporary restraining order prohibiting implementation of UTU's strike threat.

On May 20, 1983, UTU filed counterclaims against MOPAC and KATY, which had intervened as a plaintiff, challenging KATY's use of KATY crews to operate KATY trains in trackage rights service. UTU alleged that KATY's trackage rights operations violated an "actual and objective rule and working condition" governing MOPAC employees, asserting the existence of a requirement that "trains operating over trackage owned by MoPac . . . be manned by MoPac crews." Designated Record at 33, ¶¶ 8, 9. UTU also contended that MOPAC and KATY had violated certain notice and negotiation conditions of the ICC's approval of KATY's trackage rights. Both of these issues, as well as issues raised by MOPAC's complaint, subsequently were presented by UTU directly to the ICC. On June 29, 1983, UTU filed a petition for clarification in which it asked the ICC to rule

> [T]hat its prior orders (1) did not select the forces to perform the trackage rights operations, (2) did not relieve the carriers of their obligations under the Railway Labor Act to avoid unilateral changes of working conditions, and (3) did not relieve the carriers of their obligations to comply with the notice and negotiation provisions of the employee protective provisions imposed in the sub-proceedings at bar to protect the interests of MP employees affected by those transactions.

Missouri Pacific Railroad Co. v. United Transportation Union, 580 F. Supp. 1490, 1497 (E.D. Mo. 1984).

A few months later the ICC issued a decision rejecting all three of UTU's arguments regarding the selection of crews. *See Denver & Rio Grande Western Railroad Co.,* I.C.C. Finance Docket No. 30,000 (Sub-No. 18 *et al.*) (October 19, 1983) (unpublished), *reprinted in* Brief for Appellants, Appendix I. The ICC held that (a) "trackage rights agreements do not involve a change in UP-MP employees' working conditions," *id.* at 5; (b) MOPAC's employees have "no right to participate in the trackage rights crew selection process," *id.* at 4-5; and (c) pursuant to 49 U.S.C. § 11341, the ICC's approval of KATY's trackage rights applications exempted MOPAC and KATY from any inconsistent requirements of the Railway Labor Act or their collective bargaining agreements, *id.* at 15.

Soon thereafter the parties filed cross-motions for summary judgment. On March 1, 1984, the District Court issued a memorandum opinion, 580 F. Supp. 1490 (E.D. Mo. 1984), explaining in detail the basis for its February 7, 1984 preliminary injunction and granting in part the railroads' motions for summary judgment. The District Court made detailed findings of fact, including a finding that the strike threatened by UTU would cause irreparable injury to MOPAC and to the thousands of shippers it serves. In its conclusions of law, the District Court held that (a) the dispute between MOPAC and UTU is a "minor" dispute within the meaning of the Railway Labor Act, and, therefore, section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, does not bar a labor injunction; (b) alternatively, if this is a "major" dispute within the meaning of the Railway Labor Act, the threatened strike would be illegal because the ICC has exempted the railroads from any duty to negotiate with appellants concerning crew selection for KATY's trackage rights, and section 4 of the Norris-LaGuardia Act must give way to the ICC's power to determine labor disputes in connection with consolidation and trackage rights proceedings; and (c) section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, does not prevent the issuance of a preliminary injunction because plaintiffs have not violated its provisions. 580 F. Supp. at 1499-1506.

On March 30, 1984, the District Court entered its permanent injunction against the threatened strike, and issued an accompanying memorandum which, *inter alia,* denied UTU's motion to exclude from the scope of the injunction the individual union members. D.R. at 139-45.

Meanwhile, UTU and another union, the Brotherhood of Locomotive Engineers, petitioned the United States Court of Appeals for the District of Columbia Circuit to vacate the ICC orders granting KATY the right to use its own crews in trackage rights service and exempting under 49 U.S.C. § 11341(a) these crew selection prerogatives from the Railway Labor Act and other laws. On May 3, 1985 (several months after oral argument had been heard on the appeal in the instant case) the District of Columbia Circuit handed down its decision. *Brotherhood of Locomotive Engineers v. ICC,* 761 F.2d 714 (D.C. Cir. 1985), *petition for cert. filed,* 54 U.S.L.W. 3359 (U.S. Nov. 7, 1985) (No. 85-792). In a two-to-one decision, the D. C. Circuit panel held that the ICC had failed to show that the exemption from the Railway Labor Act respecting crew selection was necessary. Accordingly, the court vacated the ICC orders relied upon by the railroads and left the parties to their Railway Labor Act remedies. A petition for rehearing and suggestions for rehearing en banc were filed, and on July 12, 1985, the D. C. Circuit *sua sponte* amended its opinion so that instead of leaving the parties to their Railway Labor Act remedies the court remanded the case to the ICC, giving the ICC the opportunity to exercise its exemption authority by explaining "why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction." *Id.* at 725. The opinion thus having been amended, the petition for rehearing and suggestions for rehearing en banc were denied on August 9, 1985.

The ICC then petitioned the Supreme Court for a writ of certiorari; the Court has not yet ruled on the petition, and the D.

C. Circuit, which first stayed its mandate and then eventually issued it on November 12, 1985, recalled its mandate on November 18, 1985 pending the Supreme Court's action. The ICC orders relied upon by MOPAC and KATY, and by the District Court, are thus still in force.

On December 23, 1985, appellants filed a petition for a writ of certiorari requesting the Supreme Court, if it grants review of the D. C. Circuit case, to review the present case before judgment by our Court. The Supreme Court has not yet acted upon this petition. We could hold our decision in abeyance during the pendency of the petition, or proceed to issue it now. For whatever assistance it may be to the parties and to the progress of the litigation, we issue it now.

As the District Court correctly noted, if a dispute is minor and cannot be resolved by the normal grievance procedure, the parties must submit their differences to the National Railroad Adjustment Board, the jurisdiction of which is exclusive. *See Andrews v. Louisville & Nashville Railroad Co.,* 406 U.S. 320 (1972). It follows that a strike over minor disputes violates the Railway Labor Act and may be enjoined by a federal district court, notwithstanding the prohibitions of the Norris-LaGuardia Act. *See Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.,* 373 U.S. 33 (1963); *Chicago and Northwestern Transportation Co. v. United Transportation Union,* 656 F.2d 274, 277 (7th Cir. 1981). On the other hand, the Norris-LaGuardia Act prevents the issuance of an injunction against a railway labor strike over a major dispute, since the Railway Labor Act requires only that the parties negotiate major disputes and "does not provide a process for a final decision like that of the Adjustment Board in a 'minor dispute' case." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.,* 353 U.S. 30, 42 n.24 (1957). The District Court further noted correctly that the essential test is whether the dispute "evolv[es] from the bargaining process for a new or altered contract" (major dispute) or

whether the dispute is "over the meaning of an existing collective bargaining agreement" (minor dispute). 580 F. Supp. at 1500 (quoting *Chicago and Northwestern Transportation*, 656 F.2d at 277-78). The District Court then relied upon the strike threat Mailgram from UTU for the conclusion that the instant dispute is a minor rather than a major one. As previously mentioned, UTU's Mailgram demanded a halt to MOPAC's "trespass on our collectively bargained agreements and our seniority." Based thereon, the District Court concluded that the dispute was "reasonably susceptible to resolution by reference to the contracts between the parties." 580 F. Supp. at 1500.

Appellants contend that the District Court's resolution of the "minor dispute' question on motions for summary judgment was inappropriate because there was a factual dispute as to the underlying reasons for the threatened strike. Appellants submitted an affidavit to show that the dispute involved unsuccessful efforts to negotiate modifications to existing working conditions, and thus that the dispute was a major dispute. We agree with appellants that the affidavit created a factual issue sufficient to preclude summary judgment on the "minor dispute" ground. *See* Fed. R. Civ. P. 56(c).

Our conclusion that the District Court erred in ruling the dispute a minor dispute on motions for summary judgment is not, however, the end of the matter, for the court also held, as an alternative basis for its decision, that even if the dispute is a major dispute the Norris-LaGuardia Act does not bar a labor injunction in this case. In a carefully reasoned opinion the District Court held that MOPAC is exempted under § 11341(a) of the Interstate Commerce Act (ICA), 49 U.S.C. § 11341(a), from the requirements of the Railway Labor Act (RLA) with respect to major disputes. We quote from the District Court's opinion:

> RLA § 156 imposes a duty on carriers to negotiate over certain "major" disputes. 45 U.S.C. § 156. It is easy to see why it is necessary that MOPAC be exempted from that duty, insofar as it related to UTU's demand that MOPAC negotiate over the selection of forces to operate KATY trains on MOPAC lines. There is nothing that UTU/MOPAC negotiations could do to change the crew selection provisions approved by the ICC. Under the ICA the ICC has authority to approve the transactions, including trackage rights agreements, between carriers. 49 U.S.C. § 11341 *et seq.* Here the ICC expressly and emphatically stated that "[p]rovisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and *may be implemented without further approval.*" F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983), at 15 (emphasis added). *See Finding of Fact No. 23.* MOPAC cannot unilaterally change a material term of a trackage rights agreement approved by the ICC and therefore MOPAC was immune from any requirement of the RLA to negotiate over such a material term.

580 F. Supp. at 1502-03 (footnote omitted). In addition, the District Court rejected UTU's argument that it remains free to strike over MOPAC's refusal to negotiate about the selection of forces for KATY trains operating on MOPAC lines. To the contrary, the District Court held that in this case the anti-injunction provisions of the Norris-LaGuardia Act (NLGA) are displaced by the jurisdiction of the ICC under the Interstate Commerce Act. The court's essential reasoning is set forth in the following passage from its opinion:

> In the case at bar the ICC authoritatively resolved the question of which employees may operate KATY's trains over MOPAC lines. The NLGA must be accomodated to this exercise of the ICC's power, because allowing UTU to strike would be tantamount to saying that UTU has carte

blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

Although it is not for this Court to question the wisdom of Congress' action, in this case it is not difficult to see why Congress intended the NLGA to be inapplicable to ICC-resolved, consolidation-related labor disputes. In the case at bar, UTU and other labor representatives participated in the ICC proceedings. *See Findings of Fact No. 6.* UTU does not contend that it did not have adequate opportunities to object to any provision of the transaction, including the trackage rights agreement, or to seek favorable treatment. UTU either failed to object to the crewing provisions of KATY's trackage rights application or it did object and the ICC rejected its objection. In either case, it is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

Moreover, it is not probable that Congress intended to allow UTU to strike where UTU's objective is to obtain an advantage which MOPAC is now unable to give—the right to operate KATY trains that run over MOPAC lines. If MOPAC gave that right to any of its employees, MOPAC would breach its agreement with KATY and would vary a material term of an agreement approved by the ICC. If UTU obtained its objective by striking, wouldn't KATY employees then be free to strike to obtain the same advantage? To avoid the stifling effects that such economic power would have on any attempt to consolidate railroad operations, Congress vested the ICC with the authority to resolve such disputes during approval proceedings. Affected employees are not left out in the cold, because §

> 11347 requires the ICC to impose employee protective conditions. 49 U.S.C. § 11347. The balance and efficiency which Congress sought to achieve with this scheme would be essentially and materially frustrated if employees were free to strike.

580 F. Supp. at 1505-06 (footnote omitted).

We agree with the reasoning of the District Court on the alternative ground set forth above and believe that the court clearly was correct in permanently enjoining appellants from striking, picketing, and engaging in other forms of concerted action over the crew selection issue already decided by the ICC. We have considered all the arguments raised by appellants and find them to be without merit. Accordingly, we affirm the judgment of the District Court on the basis of that court's well-reasoned opinion.

AFFIRMED.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[TO BE PUBLISHED.]